Supreme Court, U.S.
FILED
JAN 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-796

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

AMERICAN FINANCIAL SERVICES ASSOCIATION,
Petitioner,

v.

FEDERAL TRADE COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER AMERICAN FINANCIAL SERVICES ASSOCIATION

ROBERT B. EVANS
FRANK M. SALINGER
AMERICAN FINANCIAL SERVICES ASSOCIATION
1101 Fourteenth St., N.W.
Washington, D.C. 20005

WILLIAM H. ALLEN *
DAVID H. REMES
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for American Financial Services Association

* *Counsel of Record*

January 14, 1986

BEST AVAILABLE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-796

AMERICAN FINANCIAL SERVICES ASSOCIATION,
Petitioner,

v.

FEDERAL TRADE COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER AMERICAN FINANCIAL SERVICES ASSOCIATION

The government's opposition is drafted to suggest that the FTC's rule is merely directed against objectionable contract language—"boilerplate."[1] The Court should not be misled. The FTC's rule does not dictate the *language* in which consumer credit con-

[1] See Opposition at p. (I) (FTC found "inclusion of a particular boilerplate clause" to be unfair), p. 2 ("boilerplate"), p. 3 n.4 ("boilerplate"), p. 5 ("boilerplate"), p. 6 ("boilerplate"), p. 12 ("boilerplate") (twice). See also *id.* at 7 (rule aimed at "use of clauses effecting assignments of future wages").

tracts may be written; it dictates the *terms* on which credit may be secured, forbidding consumers to obtain loans by pledging household goods or future earnings as security.[2] The FTC made a judgment that, as Judge Tamm wrote, "those whose access to credit depends upon the pledge of meager household goods and future earnings would be better off if creditors were unable and unwilling to extend to them credit." (Pet. App. 79a.) It is the FTC's attempt to implement this paternalistic judgment through an assertion of its power to prohibit "unfair" acts or practices that AFSA attacks as unprecedented and unlawful—a construction of the agency's authority under Section 5 that poses a profound challenge to "the doctrine against uncanalized delegations of legislative power." *Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring in judgment).[3] Whether the agency's power extends so far is no mere question of substantial evidence (Opposition at 9) but a fundamental question of statutory authority.

---

[2] The fact is that the FTC has no objection to "boilerplate" as such. "The use of standardized forms," it said in its statement of basis and purpose, "is an efficient, low cost method of conducting a loan transaction." (Pet. App. 110a.) So far as pledging household goods as collateral is concerned, even a standardized form contract must be at least checked and, more often, filled out with a list or description to complete the transaction. (*Id.* at 175a-76a.) In such cases, the FTC conceded, "there should be little question [in the consumer's mind] either that a security interest has been given or as to the scope of its coverage." (*Id.* at 176a.) It has never even been contended that borrowers who pledge their future earnings as security do so other than deliberately.

[3] See generally Schoenbrod, *The Delegation Doctrine: Could The Court Give It Substance?* 83 Mich. L. Rev. 1223 (1985).

CONCLUSION

The petition should be granted.

Respectfully submitted,

ROBERT B. EVANS
FRANK M. SALINGER
AMERICAN FINANCIAL SERVICES ASSOCIATION
1101 Fourteenth St., N.W.
Washington, D.C. 20005

WILLIAM H. ALLEN
DAVID H. REMES
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for American Financial Services Association

January 14, 1986